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IN THE

Supreme Court of the United States

October Term, 1963

No. 1049

[Consolidated Actions]

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,

Petitioner,

AGAINST

OLGA ZDANOK, *et al.*,

Respondents.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,

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FRANK T. ALEXANDER, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONS FOR CERTIORARI

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Question Presented

Whether, in an action against petitioner by some former employees for damages for breach of a collective bargaining agreement, which has resulted in final judgment against petitioner on the issue of liability, petitioner may relitigate the same issue in the same action, as well as the same issue under the same agreement in a companion action brought against it by other former employees whose suit had been held in abeyance until the issue of liability in the first action was finally resolved.

Statement

On March 28, 1961 the United States Court of Appeals for the Second Circuit, in *Zdanok* v. *Glidden Co.*, 288 F. 2d 99, reversed a judgment of the District Court after trial, 185 F. Supp. 441 (1960), and held on the merits that petitioner in 1957 had breached a collective bargaining agreement, for which it was answerable in damages, by refusing to afford employment with seniority to employees at its Elmhurst, New York plant upon petitioner's relocation of that plant at Bethlehem, Pennsylvania. Petitions for rehearing and rehearing *in banc* were unanimously denied by the Court of Appeals.

A petition for a writ of certiorari in this Court was granted on the limited issue whether Judge Madden of the Court of Claims could constitutionally participate in the judgment of the Court of Appeals, but the petition was denied on the questions involving the merits, 368 U. S. 814 (1961). Thereafter, this Court affirmed the judgment, 370 U. S. 530 (1962). Petitioner then sought rehearing, including rehearing of the denial of certiorari on the merits, but this petition was denied, 371 U. S. 854 (1962).

On remand, the District Court on respondents' motion consolidated the *Zdanok* action, in which 5 employees are plaintiffs, with the *Alexander* action, an identical action brought by 157 other former employees covered by the same agreement.[1] Decision was reserved on respondents' motion for summary judgment on the issue of liability and for an assessment of damages, and another trial was held. At this trial petitioner offered the testimony of witnesses, who had not testified at the first trial, as to the alleged construction of the agreement by the parties. After this trial the District Court held, 216 F. Supp.

[1] Although petitioner sought to imply in the Court below that the *Alexander* action was an afterthought, having been commenced in the District Court in 1962 after judgment of affirmance was rendered by this Court in *Zdanok*, both the prevailing and concurring opinions in

476 (1963), that it was bound by the Court of Appeals' interpretation of the agreement, and it thereupon granted respondents' motion for summary judgment on the issue of liability and ordered that damages be assessed.

From this judgment petitioner appealed to the Court of Appeals, which affirmed the judgment unanimously, 327 F. 2d 944 (1964). The Court of Appeals held that its first decision in *Zdanok*, construing the collective bargaining agreement here involved and holding that petitioner had breached the agreement, establishes the law of the case and is binding on petitioner in both the *Zdanok* action and the *Alexander* action.

As to the *Zdanok* action, the Court of Appeals held that the issue of liability was heretofore finally decided, that the District Court had no power to consider the additional testimony offered at the second trial, and, even if the case were originally disposed of under state law rather than federal law, as petitioner argued, state law is not different from federal law on the matter in dispute and was "absorbed as federal law" under the doctrine of *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 457 (1957).

As to the *Alexander* action, the Court of Appeals also held that the new testimony should not be considered, in view of the Court's prior ruling on the issue of petition-

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the Court of Appeals show that petitioner's employees who sue in *Alexander*, along with the employees in *Zdanok*, actually brought identical actions against petitioner in 1958 in the Supreme Court of New York. Although petitioner removed the *Zdanok* action to the District Court, on diversity grounds, it failed to do so in *Alexander*, which, as the Court of Appeals points out, "remained quiescent" while *Zdanok* was being "prosecuted by Glidden with the utmost vigor." Upon the disposition of the *Zdanok* action by this Court, and because of petitioner's refusal to remove the pending state court action involving the great majority of petitioner's employees, the *Alexander* action, identical to *Zdanok*, was filed in their behalf in the District Court, and the state court action was discontinued. Throughout every step of the extended proceedings, as the Court of Appeals emphasizes, the *Zdanok* action was treated by the parties and the courts as the test case for the *Alexander* plaintiffs.

er's liability in *Zdanok* under the collective bargaining agreement here involved, declaring (App., pp. A-31, A-32):

> "We meant our previous ruling to be final on the hotly contested issue of liability under Glidden's contract with its employees, the Supreme Court affirmed this, and we have now affirmed it again."

Taking cognizance of the fact that "Glidden's opportunity to litigate the *Zdanok* case was both full and fair" and that the "*Zdanok* litigation was prosecuted by Glidden with the utmost vigor," with full knowledge of the pendency of the *Alexander* action, the Court found no basis for permitting the same issues finally and conclusively resolved against petitioner after extensive proceedings in *Zdanok* to be litigated *de novo* in *Alexander* (App. pp. A-33, A-34).

Argument

The long history of this "much litigated" case,[2] in which a wide variety of legal questions has already undergone searching judicial scrutiny, of itself seems to contradict any claim that important new federal questions have arisen which now require settlement by this Court.[3]

Petitioner nevertheless argues for reconsideration of the case, claiming this is now a different case because, following the final decision on the issue of liability, law was declared and additional facts were adduced that call

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[2] See opinion below, App., p. A-15.

[3] An outline of the history of this case in the federal courts appears in footnote 1 of the opinion of the Court of Appeals. It may be additionally noted that in October 1957, prior to the proceedings outlined, respondents' union sought to arbitrate the issues with petitioner. On petitioner's motion, however, arbitration was stayed by the New York Supreme Court, on the ground that the issues were not embraced by the arbitration provisions of the collective bargaining agreement. The state court expressly left the parties to other available remedies. *Matter of Gen'l Warehousemen's Union*, 10 Misc. 2d 700 (Sup. Ct. Queens Co. 1958).

for the reversal of the result reached. The Court of Appeals, exploring this contention with care and at some length, has concluded that it is untenable.

(1)

On the matter of emerging new law, petitioner cites *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962) for the proposition, not contested by us, that federal law is applicable in construing the collective bargaining agreement, and petitioner asserts that the judgment construing the agreement in this case should be overturned because it rests on state law. We adopt the view of the Court of Appeals: even if it were assumed that New York law was applied in construing the agreement here involved (and this is by no means obvious), federal law and New York law are the same where a court is confronted with the problem of construing a collective bargaining agreement. Indeed, even if state law is applied, it "will be absorbed as federal law." *Textile Workers Union* v. *Lincoln Mills* 353 U. S. 448, 456-457 (1957).

Petitioner's argument that the decision below now creates a conflict with *Oddie* v. *Ross Gear & Tool Co., Inc.*, 305 F. 2d 143 (6th Cir. 1962), cert. den. 371 U. S. 941 (1962), because the first *Zdanok* decision was based on state law and "the conflict did not arise until the prior holding was adopted by the court below in the instant cases as federal substantive law" (Pet., pp. 8, 26 at fn. 17) is a strained and fallacious one. Certainly, the Court below in its second decision did not say that it was adopting its prior decision as federal law. Moreover, the first *Zdanok* decision was "absorbed" as and constituted federal law when that decision was rendered. See *Procter & Gamble Ind. Union* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181, 186 (2d Cir. 1962); *Livingston* v. *John Wiley & Sons, Inc.*, 313 F. 2d 52, 58-59 at fn. 4 (2d Cir. 1963), aff'd 84 S. Ct. 909 (1964). It did not become federal substantive law by "adoption" under the second decision of the Court of Appeals. Thus, if any conflict among the cir-

cuits can be thought to exist,[4] it would not exist by reason of the decision of the Court below.

The other federal decisions mainly relied on by petitioner as constituting governing law, are, as the Court of Appeals states, distinguishable. The same cases were repeatedly cited and relied on by petitioner—even before *Smith* v. *Evening News Ass'n* was decided—on the first appeal to the Court of Appeals (Brief, pp. 21-23), on the first petition for certiorari (Petition, pp. 14-16), on the petition for rehearing of the denial of certiorari (Petition, pp. 5-6), and on the second appeal to the Court of Appeals (Brief, pp. 23-25). Because the authorities cited by petitioner were not accepted by the courts as decisive of the case at bar, it does not follow that they were rejected because of their federal source, or that state law was being applied. Certainly, the Court of Appeals did not declare this to be so and it has now stated expressly that those authorities are distinguishable from the case at bar. At no stage did we argue that petitioner's authorities were inapplicable because their origin was federal law; at every step we pointed out the clear factual differences between those decisions and the instant case (Brief on first appeal to Court of Appeals, pp. 20-22; Brief in opposition to first petition for certiorari, pp. 12-14; Brief on second appeal to Court of Appeals, pp. 9, 19-21).

In reality, therefore, *Smith* v. *Evening News Ass'n* has added nothing to the substance of petitioner's argument, and its present claim based on that decision is lacking in merit. Petitioner's argument does not pose an im-

[4] In *Oddie* the Sixth Circuit pointed out that "the agreement in the *Glidden Company* case is materially different from the agreement in the present case, and in our opinion is not applicable on this phase of the case" (305 F. 2d at 149). And, in *Livingston* v. *John Wiley & Sons, Inc.*, 313 F. 2d 52 at 58-59 at fn. 4 (2d Cir. 1963), aff'd 84 S. Ct. 909 (1964), the Court below described *Oddie* as one which "recognize[d] that the matter is solely one of the 'construction of the agreement'".

portant federal question requiring settlement by this Court.

(2)

Petitioner also argues that its additional testimony at the second trial compels a result different from that previously reached.[5] This contention (passing for the moment the question whether, against the history of this case, the additional testimony can properly be considered) is directed solely to the construction of the particular agreement here involved. Considering the "great variations" existing among seniority provisions of collective bargaining agreements (*Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U. S. 521, 526 [1949]), petitioner's contention respecting the construction of the agreement at bar would not seem to raise an important question of federal law which should be settled by this Court.

(3)

The Court of Appeals has held, however, that the new testimony cannot be considered either in *Zdanok* or in *Alexander*, because its previous decision was final and binding on the issue of petitioner's liability under this collective bargaining agreement. Does this holding by the Court of Appeals as to the law of the case present an important question of federal law which should be settled by the Supreme Court?

As to *Zdanok*, the correctness of this holding would seem to be so plain as to require no extended discussion. That case had been tried on the issue of liability; the parties rested, and the record was closed; a final decision after trial and after appeal was rendered. Against this background we suggest it would be unthinkable to allow petitioner to offer additional evidence at a second trial

[5] We note that the Court below did not regard the additional evidence as "truly convincing" or "probative" (App., pp. A-28, A-29).

as if all of the prior proceedings had been futile. Such a course would render the litigation—already protracted—interminable.

As to *Alexander*, and as the Court below states, ever since 1958 the parties and the courts at every stage of the litigation had been proceeding on the basis that the issue of petitioner's liability under this collective bargaining agreement was being resolved for all purposes. Indeed, the Court of Appeals declares that this was its intent in deciding *Zdanok*: "We meant our previous ruling to be final on the hotly contested issue of liability under Glidden's contract with its employees * * * ". —binding upon petitioner not only as to the five employees in *Zdanok*, but as to all employees suing petitioner who occupied identical positions (App., pp. A-31, A-32). The agreement was the same for all; the identity of the issue of liability was the same for all. As the Court below shows in an extensive discussion, the application of the law of the case doctrine to *Alexander* in the circumstances here involved is not novel; the need of mutuality of estoppels "has been much eroded in recent years" (App., p. A-30). See *Bruszewski* v. *United States*, 181 F. 2d 419 (3rd Cir. 1950), cert. den. 340 U. S. 865 (1950); *Adriaanse* v. *United States*, 184 F. 2d 968 (2d Cir. 1950), cert. den. 340 U. S. 932 (1951).

Petitioner assuredly had sufficient opportunity to litigate the issue of its liability in *Zdanok* and it did so "diligently" and "with the utmost vigor" (App., p. A-34). The decision of the Court of Appeals holding petitioner to the decision previously rendered against it is in these circumstances scarcely unwarranted. All of the judges below were of this view. The asserted conflict between the decision below and other cases cited by petitioner, in the circumstances here involved, is more imagined than real. The decision, we submit, does not pose an important question of federal law which requires settlement by this Court.

Finally, in response to petitioner's statement that "the estoppel issue was never raised, briefed or argued in the courts below" (Pet., p. 21), we would state that this question was raised by respondents in the District Court and in the Court of Appeals. The opinion of the District Court, in essence, rests on this point. (App., p. A-8). And, in the Court of Appeals, we stated at the outset of our argument in our brief (at p. 7):

> "We view this decision [of the Court of Appeals in *Zdanok*, 288 F. 2d 99] as completely resolving the issue of liability against this defendant in *Zdanok*, and as binding and controlling upon the same defendant in the identical *Alexander* action, which involves the same agreement and is based on the same facts."

In view of this background in the District Court and in the Court of Appeals, petitioner cannot reasonably be heard to argue that it is entitled at this time to an opportunity to argue this question in this Court.

CONCLUSION

For the foregoing reasons this petition for writs of certiorari should be denied.

May 4th, 1964.

Respectfully submitted,

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